Benchmark Industries, Inc. *and* Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC. Case 26-CA-10197

20 April 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 3 October 1983 Administrative Law Judge Mary Ellen R. Benard issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and hereby orders that the Respondent, Benchmark Industries, Inc., Burnsville, Mississippi, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] In fn. 7 of her decision, the judge reported that the court of appeals "enfd. in part" the Board's decision in *Armitage Sand & Gravel*, 203 NLRB 162, 166 (1973). The citation should read "enforcement denied in pertinent part 495 F.2d 759 (6th Cir. 1974)."

In affirming the judge's conclusion that the Union did not waive its right to bargain over the effects of the Respondent's decision to cease operations and terminate its employees, we find it unnecessary to rely on Respondent's conduct in Cases 26-CA-9011, 26-CA-9527, and 26-CA-9633, which are currently pending before the Board. We rely instead on the judge's factual findings that the Respondent did not formally notify the Union of its decision and that the Union did not learn of Respondent's decision until an employee showed the Union's organizer a copy of the termination notice enclosed with her final paycheck. Under these circumstances, including Respondent's refusal to bargain pending its test of certification before the Fifth Circuit, we find the Respondent's waiver argument to be without merit. See *Peat Mfg. Co.*, 261 NLRB 240 fn. 2 (1982).

DECISION

STATEMENT OF THE CASE

MARY ELLEN R. BENARD, Administrative Law Judge. The original charge in this case was filed on May 6, 1983,[1] by Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, herein called the Union, against Benchmark Industries, Inc., herein called Respondent. On June 20 a complaint issued alleging, in substance, that the Union is the certified representative of Respondent's employees in an appropriate bargaining unit, and that by terminating all its employees and ceasing operations at its Burnsville, Mississippi, facility without prior notice to the Union or affording it an opportunity to negotiate and bargain as to the effects of Respondent's conduct, Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act. Respondent has denied the commission of any unfair labor practices.

A hearing was held before me at Memphis, Tennessee, on August 8. Following the hearing the General Counsel and Respondent filed briefs, which have been considered.

On the entire record in the case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF RESPONDENT

Respondent is a corporation and maintained a place of business in Burnsville, Mississippi, where it was engaged in the manufacture of clothing for some period of time prior to April 11. Respondent annually, in the course and conduct of its business operations, sold and shipped from its Burnsville facility products, goods, and materials valued in excess of $50,000 directly to points outside the State of Mississippi and purchased and received at the same facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of Mississippi. The complaint alleges that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits that prior to April 11 it sold and shipped and purchased and received goods and materials in the amounts alleged in the complaint. However, Respondent alleges that it has not been engaged in interstate commerce within the meaning of the Act since that date and introduced evidence that on July 11 its president and corporate secretary executed a statement of intent to dissolve the corporation. Thus, according to Respondent, the Board has no jurisdiction over it.

For the reasons discussed below, I find no merit to Respondent's contentions. I therefore find that Respondent is an employer engaged in commerce within the meaning of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Refusal To Bargain*

The Union was certified as the collective-bargaining representative of Respondent's production and maintenance employees on June 22, 1981. Respondent thereafter refused to bargain with the Union on grounds that the certification was invalid and, consequently, on December 21, 1981, the Union filed a charge in Case 26-CA-9491 alleging that Respondent's refusal to bargain violated Section 8(a)(5) and (1) of the Act. The Regional Director issued a complaint in that case and, subsequent-

[1] All dates herein are 1983 unless otherwise indicated.

ly, the General Counsel filed a Motion for Summary Judgment with the Board. On June 17, 1982, the Board issued its decision in *Benchmark Industries, Inc.*,[2] granting the motion for summary judgment and ordering Respondent to recognize and bargain with the Union. On November 4, 1982, the Board filed an application for enforcement of its order with the United States Court of Appeals for the Fifth Circuit, and oral argument in that proceeding was set for September 26. In the meantime, on October 22, 1982, Administrative Law Judge William A. Gershuny issued a decision in Cases 26–CA–9011, 26–CA–9527, and 26–CA–9633, in which he found that Respondent had violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing its previous policy of providing employees with a meal and a 5-pound ham at Christmas, but that Respondent had not committed certain other violations of Section 8(a)(1) and (3) of the Act as alleged by the General Counsel. Those cases are currently pending before the Board.

It is undisputed that, at least as of the time of the hearing in the instant matter, Respondent has persisted in its refusal to bargain with the Union.

On April 11, Respondent's facility burned down. It is undisputed that the building was totally destroyed, and that, as of the date of the hearing, Respondent had not resumed operations at that location. In consequence, Respondent terminated all of its employees, estimated by Danny Forsyth, an organizer for the Union, as numbering approximately 400. Forsyth credibly testified[3] that a week or two after the fire an employee gave him a copy of a notice which had been given to her with her last paycheck. Forsyth further credibly testified that prior to his receipt of this notice there had been no conversations with any officials of Respondent about the closing of the plant, the termination of the employees, or severance pay for them. The notice, which is on Respondent's letterhead, reads as follows:

NOTICE TO ALL EMPLOYEES

> The cause of the fire that completely destroyed our plant on April 11, is not yet known. All materials, equipment and records have been lost in the blaze.
>
> Obviously, we are unable to operate without our physical plant. Regrettably, all employees have been terminated for lack of work. Unfortunately, we are unable to continue you [sic] group health and accident coverage, after April 30, 1983. However, those who wish to convert their Phoenix Mutual Life Insurance may do so by completing and forwarding the request form.
>
> Those of you who have not yet found other employment should apply for unemployment compensation. We have notified the Employment Office that each of you is immediately eligible to draw unemployment money.
>
> I want to thank all of you for your past service to Benchmark and wish you well in the future.
>
> Yours truly,
> BENCHMARK INDS. INC.
> JACK BYRAM
> PLANT MANAGER

Forsyth credibly testified that to his knowledge the Union had not made any effort to contact Respondent to request bargaining concerning the effects of the fire and the consequent closing of the plant.

B. *Analysis and Conclusions*

The complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union about the effects of its decision to close the plant following the fire. As the Board has stated:

> [I]t is . . . well established that, even under the circumstances of a complete cessation of business, the employer is obligated to afford the union an opportunity to discuss the impact and effect of the closing on bargaining-unit employees.[4]

Respondent concedes the general principle that an employer is obligated to bargain about the effects of a decision to terminate its operations and that it refused to bargain with the Union after the fire, but contends that in the instant case its failure to bargain was excused. Specifically, Respondent asserts that it had no obligation to bargain because (1) the Board has no jurisdiction over it inasmuch as the facility was destroyed by a fire, there are no employees, and the corporation is in the process of dissolution; (2) the Board's certification of the Union is currently being contested before the United States Court of Appeals for the Fifth Circuit; (3) inasmuch as the fire completely destroyed the facility, "bargaining about the effects of ceasing operations and terminating the employees would have been futile, impractical and a waste of time"; and (4) the Union waived any right to bargain about the effects because it failed to contact Respondent after the fire and request bargaining.

1. The jurisdiction question

Respondent contends that, because the plant was not operating as of the dates that the charge was filed and the complaint issued, it is not engaged in commerce within the meaning of the Act. However, in *American Gypsum Co.*, 231 NLRB 1291, 1298 (1977), the Board adopted the finding of the administrative law judge that there was no merit to respondent's argument that because it was shut down during the period when the unfair labor practices were alleged to have occurred it was not engaged in commerce at that time and there was no legal or statutory basis for asserting jurisdiction. In so finding, the administrative law judge stated:

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[2] 262 NLRB 247.

[3] Forsyth appeared to be a candid witness who testified with good recollection and I credit him. In any event, Respondent did not call any witnesses and Forsyth's testimony is not controverted by any other evidence.

[4] *Merryweather Optical Co.*, 240 NLRB 1213, 1215 (1979). (Footnote omitted.)

> I am persuaded that Respondent's position is without merit by reason of the consequences which would flow from a holding sustaining said position. The Board has long asserted jurisdiction based solely upon the annual monetary standards which are admittedly met herein. If Congress or the Board intended that the Act were not to apply to an employer meeting said standards merely because it was not operating at the time the unfair labor practices were committed, it would follow that any time an employer was shut down (whether for seasonal, economic, or other reasons) it, as well as a labor organization involved with it, would be free to ignore the provisions of the Act. I am convinced that neither the courts nor the Board would accept such an interpretation of the intent of Congress in passing the Act and it would certainly not effectuate the purposes of the Act to so interpret it.

I find that the same reasoning applies in the instant case, and I therefore conclude that the fact that Respondent ceased its operations after April 11 does not warrant a finding that the Board has no jurisdiction in this proceeding.[5]

2. The pending litigation before the court of appeals

Respondent contends that, because the United States Court of Appeals for the Fifth Circuit is currently considering the Board's application for enforcement of the decision reported at 262 NLRB 247, it is not obligated to bargain with the Union at this time. However, it is well settled that an employer is not entitled to refuse to bargain with the certified representatives of its employees while it litigates the validity of that certification in the courts of appeals.[6] Indeed, as the Board observed in *John Cuneo, Inc.*, 257 NLRB 551, 552 (1981): "Section 10(g) of the Act provides that the commencement of proceedings under Section 10(e) or (f), which provide[s] for court review of Board orders, 'shall not, unless specifically ordered by the court, operate as a stay of the Board's order.'" Accordingly, I find no merit to Respondent's contention that collateral litigation of the validity of the certification in the court of appeals justifies its refusal to bargain.

3. Whether bargaining in these circumstances would have been futile

Respondent contends that there is no point to ordering bargaining about the effects of closing the plant against an employer that no longer exists. However, the Board has long held that "[i]t is well settled that mere discontinuance in business does not render moot issues of unfair labor practices alleged against a respondent."[7] With respect to the contention that bargaining in these circumstances would be futile, although Respondent was not operating at the time of the hearing, and although it has filed a statement of intent to dissolve, there is no indication that it has completely gone out of business or that it might not resume operations either by rebuilding the plant that burned down or at another location. Furthermore, although the plant was destroyed, it is possible that Respondent will receive proceeds from such sources as insurance policies or sale of its rights to the site of the plant. Thus, funds may become available which the Union could argue should be used in part to provide severance benefits to the employees. Accordingly, I cannot agree with Respondent's contention that there is nothing to bargain about.

4. The waiver issue

It is undisputed that following the fire the Union made no attempt to contact Respondent and request bargaining about the effects of the closing of the plant. Respondent contends that the Union's failure in this regard constitutes a waiver of any right to bargain about the effects of the termination of operations.

Respondent cites *Print-Quic*, 262 NLRB 857 (1982), for the proposition that the obligation to request bargaining about the effects of a management decision is on the Union and that by failing to assert that right the Union waives it. Of course, Respondent correctly cites the general principle. However, the Board has held that where a respondent has generally refused to recognize or bargain with the representative of its employees until the court of appeals enforces a Board order directing it to do so, it would be futile for the union to request bargaining and thus its failure to make such a request is justified.[8]

In the instant case, it is undisputed that Respondent has steadfastly refused to bargain with the Union at any time since the 1981 certification. Thus, Respondent did not bargain with the Union in compliance with the Board's 1982 order, and, although Administrative Law Judge Gershuny's 1982 decision is currently pending before the Board, there was apparently no contention in that case that Respondent had in fact bargained with the Union. In these circumstances, I conclude that it would have been futile for the Union to request bargaining over the effects of the fire and consequent termination of employees and, thus, its failure to make such a request did not constitute a waiver of its right to bargain.

Having found that Respondent failed to bargain with the Union over the effects of the closing of the business, and having found no merit to Respondent's defenses, I conclude that by failing and refusing to bargain with the Union over the effects of the decision to cease its operations and terminate the employees, Respondent has violated Section 8(a)(5) and (1) of the Act.

On the basis of the above findings of fact and on the entire record in this case, I make the following

[5] Respondent further contends that the Board has no jurisdiction in this matter because the conduct by Respondent alleged to be unlawful occurred after the fire. However, although Respondent was not at that time operating the plant, it was still in existence as a corporation. Accordingly, I find no merit to this argument.

[6] *Peat Mfg., Co.*, 261 NLRB 240, 242 (1982), cases cited therein.

[7] *East Dayton Tool & Die Co.*, 239 NLRB 141 (1978), citing *Armitage Sand & Gravel*, 203 NLRB 162, 166 (1973), enfd. in part 495 F.2d 759 (6th Cir. 1974).

[8] *Peat Mfg. Co.*, supra.

CONCLUSIONS OF LAW

1. Benchmark Industries, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees at Respondent's Burnsville, Mississippi, location, including production employees, repair employees, shipping employees, timeworker employees, bundle worker employees, quality control employees, the regular part-time shipping employees, mechanics, and janitors, but excluding all office clerical employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act.

4. The Union has, since June 22, 1981, been the certified representative for purposes of collective-bargaining of the employees in the unit described above.

5. By ceasing its operations and terminating all its employees without affording the Union an opportunity to bargain over the effects of such action, Respondent has engaged in unfair labor practices within the meaning of Sections 8(a)(5) and (1) and 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act.

The General Counsel requests that the remedy include an order to Respondent to bargain with the Union about the effects of ceasing its operations and a requirement that Respondent place all the terminated employees on a preferential hiring list and offer them reinstatement in the event it resumes operations. In support of this proposition the General Counsel cites *National Terminal Baking Corp.*, 190 NLRB 465 (1971). In that case, respondent shut down its operations after two trucks were stolen and the administrative law judge, affirmed by the Board, found that inasmuch as the decision to close was due to pressing economic necessity, and there was no way to bargain about the effects of the closing before it occurred, the union was never in a position of strength at a time when such bargaining could have taken place and there was thus no reason to issue a backpay award. However, the administrative law judge did recommend that respondent be required to place the terminated employees on a preferential hiring list. I find that rationale persuasive and will therefore recommend a similar remedy. Accordingly, I shall recommend that Respondent be ordered to bargain with the Union, upon request, about the effects of the closing of the plant and the termination of the employees, and that Respondent be required to place the terminated employees on a preferential hiring list in the event it resumes operations and, at that time, offer reinstatement to those employees.

In view of the fact that there is apparently no place left in the plant for a notice to be posted, and since, in any event, all the employees were terminated, I shall recommend that Respondent be ordered to mail notices to the terminated employees.

On the foregoing findings of fact and conclusions of law and on the entire record in this proceeding, I issue the following recommended[9]

ORDER

The Respondent, Benchmark Industries, Inc., Burnsville, Mississippi, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, with respect to the effects on its employees of its decision to close its plant in Burnsville, Mississippi, and terminate its employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights to engage in or refrain from engaging in any or all of the activities specified in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain with the Union with respect to the effects on unit employees of Respondent's decision to close its Burnsville, Mississippi, plant and terminate the employees.

(b) Place the names of all its terminated employees on a preferential hiring list, and, in the event its plant reopens, offer them reinstatement, without prejudice to their seniority or other rights.

(c) Mail exact copies of the attached notice marked "Appendix"[10] to Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, and to all employees who were employed by Respondent at its Burnsville, Mississippi, plant as of April 10, 1983. Copies of said notice, on forms provided by the Regional Director for Region 26, after being signed by Respondent's representative, shall be mailed immediately upon receipt as herein directed.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

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[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[10] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT refuse to bargain with Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, about the effects of our decision which affect the employment status of our employees who are represented by the above-named labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL, on request, bargain with the Union with respect to the effects of our decision to close our Burnsville, Mississippi, plant and terminate the employees.

WE WILL place the names of our employees who were discharged as a result of our decision to close the Burnsville, Mississippi, plant on a preferential hiring list in the event we resume our operations and, at that time, offer reinstatement to these employees without prejudice to their seniority or other rights.

BENCHMARK INDUSTRIES, INC.